The District Court's findings of fact, conclusions of law, and final judgment, Appendices B and C hereto pp. 24, 30, are not reported.[1]

The Interstate Commerce Commission's report, Appendix D hereto p. 31, is in mimeograph form but not printed.

JURISDICTION

The Interstate Commerce Commission denied an application by appellee Commercial Transport, Inc., for motor carrier authority. Commercial then brought this action under 28 U.S.C. §§ 1336, 2284, 2321 to 2325, to enjoin the Commission's order. Appellant railroad companies intervened as defendants supporting the order under § 2323.

The District Court entered final judgment granting the relief sought on January 23, 1959. Notice of appeal was filed in that Court on March 23, 1959.

The Commission defended its order in District Court but did not appeal; but it has by order suspended further proceedings before it pending disposition of this appeal. Appendix E hereto p. 36. The United States supported Commercial in District Court.

Jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. § 1253. It is sustained by a large number of cases, for example:

(1) As to appeal from a judgment enjoining an order

[1] The findings of fact, conclusions of law, and final judgment are signed by the two District Judges only. The Circuit Judge died after the opinion was filed but before entry of the findings, conclusions, and judgment. At the suggestion of District Judge Platt, appellants advised him in writing that appellants "make no objection to the signing of the findings of fact, conclusions of law and final judgment by Judge Juergens and you, Judge Finnegan having died since the written opinion was filed."

and remanding to the Commission, *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Illinois*, 355 U.S. 300, 302 (1958); *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 278 (1933); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 522 (1946); *Interstate Commerce Commission* v. *Hoboken Mfrs. Railroad Co.*, 320 U.S. 368, 370-374 (1943).

(2) As to the right of appellants to prosecute this separate appeal, *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 432 (1949); *Alton Railroad Co.* v. *United States*, 315 U.S. 15, 18-20 (1942).

QUESTIONS PRESENTED

(a) Did the District Court erroneously substitute its judgment for the administrative determinations made by the Interstate Commerce Commission of issues of fact and law which are committed exclusively to the Commission?

(b) Where the only shippers who appeared at the hearing opposed the application, did the District Court properly hold that the Commission erred in determining that applicant had failed to prove that the proposed motor carrier service is required by public convenience and necessity?

(c) Where certain shippers failed to appear at the hearing and failed to support the application, and there was no proof of their positions, did the District Court err in holding that the Commission should have determined that their non-appearance and their failure to oppose the application was proof that the proposed motor carrier service is required by public convenience and necessity?

(d) Where there is total absence of shipper support for an application for proposed motor carrier service, did the District Court properly hold that the Commission erred in not considering as proof of public convenience and neces-

sity alleged advantages of motor carrier service that would have accrued had there been shipper support?

(e) Did the District Court erroneously apply the holdings in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83?

STATEMENT OF THE CASE

Proceedings Before the Commission

Commercial Transport, Inc., applied to the Commission for authority under 49 U.S.C. § 307(a)[2] as a motor common carrier of cement, in bulk, in hopper vehicles, over irregular routes between points in Illinois and Missouri.

At the hearing Commercial's vice-president in charge of operations testified that he did not know of any cement manufacturer or dealer who wanted the proposed service or would use it. Three cement manufacturers opposed the application. Their representatives testified that they control the selection of the carrier for their bulk cement, that their plants are not equipped for loading trucks, and that they would not use Commercial's service if its application were granted. They ship all of their cement by railroad and they are entirely satisfied with the rail service.

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[2] § 307(a). "Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *"

The only support for the application came from Hefkin Company, Inc., a paving contractor. Hefkin buys all of its cement under arrangements whereby the selection of the carrier is left to the exclusive control of the seller of the cement, and Hefkin has no voice in such selection.

Upon this evidence the Commission denied the application, stating its conclusion as follows (Appendix D, p. 34):

> "The paramount issue to be determined in this proceeding is whether public convenience and necessity require the operation proposed by applicant. It is incumbent on the latter to show, among other things, that the proposed service would serve a useful purpose responsive to a public demand or need. The record indicates that applicant has made no effort to determine whether any manufacturer of cement would use its service. Likewise, it appears that the supporting consignee has made no investigation of existing motor carrier service. Applicant does not have the support of a single cement manufacturer who would use its service. In fact, the evidence conclusively shows that the cement producers, who control the routing of the traffic, would not utilize its service. In the circumstances, we conclude that applicant has failed to sustain its burden of proof, and that the application should be denied."

Action of the District Court

The District Court enjoined the Commission's order and remanded the case to the Commission. The Court rejected the Commission's conclusion set out above. As part of the process of this rejection, the Court resorted to a system of reasoning by which it reached the conclusion that the cement producers would use the proposed service and that the Commission erred in reaching a contrary conclusion.

(1) The Court held that the Commission committed a

basic error in failing to take into account that two cement producers in the area did not appear at the hearing. The Court held that the Commission should have concluded that the total silence of these two producers and their failure to oppose proved that they would use the proposed service.

(2) Having thus found that there were two non-appearing cement producers who would use the proposed service, the Court further concluded that their use of motor service would have the competitive effect of forcing the three opposing producers to use motor service.

Thus in respect to these two conclusions the Court said:

> *Finding of Fact No. 9*, p. 27: "The Commission erroneously failed to find that the three opposing cement producers do not constitute all the producers in the area involved and cannot speak for the other producers. Thus, there were at least five cement producers in the area supplying the supporting consignee and two of these did not appear nor did any of their agents testify at the hearing."

This was substantially repeated in conclusion of law No. 3, p. 28.

In its opinion the Court said, p. 19:

> "No investigation was made as to whether Universal Atlas Company or Marquette Cement Company have present facilities for loading trucks, or if not, whether they intend to provide such equipment; the remaining three cement companies who now control the traffic for their bulk cement are not presently equipped for loading trucks, and because of the expense in establishing such facilities, have no immediate intention to build truck loading docks. If this application were granted and cement was trucked by or from a cement company these three cement companies would be forced by competition to make preparation for and use truck service."

This was substantially repeated in conclusion of law No. 3, p. 28.

Having arrived by this reasoning at the conclusion that cement producers who control the selection of the carrier would use the proposed service, the Court then held that, since the service would be used, the Commission should have given consideration to the advantages of motor carrier service described in the Commission's report, p. 33, and in the Court's opinion and findings, pp. 18, 25, 29.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

On a question of great importance to the transportation industry the District Court erroneously substituted its judgment for administrative determinations committed exclusively to the Commission.

The Commission holds that where shippers who control the selection of the carrier do not support an application for motor carrier authority the application will be denied.[3] This construction of § 307(a) is clearly supported by decisions of this Court. Moreover, the Commission's holding

[3] *Port Norris Express Co., Inc., Extension*, 76 M.C.C. 341, 346-347 (1958); *S and S Truck Lines, Inc., Application*, 74 M.C.C. 393, 397 (1958); *Johnson Common Carrier Application*, No. MC-117383 (Sub-No. 1), Mar. 10, 1959; *Harold C. Gabler Extension*, 69 M.C.C. 663, 665-666 (1956); *Eldon Miller, Inc., Extension*, 68 M.C.C. 583, 584 (1956); *Claude A. Staats & Son, Inc., Application*, 9 F.C.C. 301, 54 M.C.C. 822 (1952); *M. I. O'Boyle and Son, Inc., Extension*, No. MC-106965 (Sub-No. 78), Mar. 20, 1956, not printed. See article by Commissioner Everett Hutchinson and George M. Chandler, "Evidence in Motor Carrier Application Cases," in 11 Vanderbilt Law Review 1053, Oct. 1958, pp. 1071-1072.

is most obviously within the realm of administrative expert judgment committed exclusively to the Commission.

This specific holding is part of the general principle that motor carrier authority should not be authorized unless the evidence shows clearly and without speculation that it will be used if granted, a principle embodied in Commission reports[4] and decisions of this Court.

This Court's construction of the "grandfather clause" of 49 U.S.C. § 306(a)(1)[5] strongly supports the Commission's construction of § 307(a) on which the foregoing Commission decisions are based. Thus the Court holds that by force of § 306(a)(1) proof of substantial and "actual rather than potential or simulated service" is required in order to establish "grandfather rights." *United States* v. *Carolina Freight Carriers Corp.* 315 U.S. 475, 480-481 (1942). "Substantial, as distinguished from incidental, sporadic, or infrequent, service is required," *id.* p. 481. This is so because the Commission's "responsibility to bring greater order and stability to the transportation system than had earlier obtained (S. Doc. No. 152 73d Cong. 2d Sess.) is an additional reason for its insistence upon a

[4] *Transport, Inc., Extension*, 76 M.C.C. 560, 563 (1958); *Bangerter Extension*, 71 M.C.C. 105, 108 (1957); *Peake Extension*, 68 M.C.C. 45, 49 (1956); *Burnett Company, Inc. Extension*, 64 M.C.C. 400, 402 (1955).

[5] § 306(a)(1) "• • • if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time • • • except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, • • •."

showing of substantial service in that territory which is sought to be covered by a certificate under the 'grandfather clause'," *id.* p. 481.

There is a clear and compelling parallel of construction that calls for the same requirements in proof of public convenience and necessity for new operations under § 307(a) that the Court thus approved for automatic proof of public convenience and necessity under § 306(a)(1). Continuing in the *Carolina Freight Carriers* case, *supra*, 315 U.S. p. 481, the Court said: "As we indicated in *Alton R. Co. v. United States*, *supra*, [315 U.S. 15] the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior bona fide operations.'"

Similarly, the Commission's "responsibility to bring greater order and stability to the transportation system" than had prevailed before enactment of § 307(a) requires proof that a proposed new service will have actual and substantial use and will not be just a "potential" service. The burden rests on the applicant to make that proof, *Alton Railroad* case, *supra*, 315 U.S. p. 25, and a "mere holding out" will not satisfy that burden, *id.* p. 25.

The District Court cited *United States* v. *Detroit Navigation Co.*, 326 U.S. 236 (1945), for the proposition that "Future as well as immediate need of service is an essential element to be considered by the Commission as provided in the Act." But that case does not support appellees. There automobile manufacturers, whose production of vehicles for civilian use was suspended during World War II, supported water carriers' applications with evidence that they would need the applicants' services after civilian production was resumed. That case illustrates the principle that to support a grant of authority upon future public convenience and

necessity there must be some real evidence, submitted by shippers who control the traffic, not just hope or speculation by parties who do not control the selection of the carrier, that the proposed service will be used in the future. Otherwise the phrase "future public convenience and necessity" would be subject to no limit.

Moreover, the *Detroit Navigation* case is emphatic on the point that in the determination of what constitutes "future public convenience and necessity" the Commission has been entrusted "with a wide range of discretionary authority," p. 241.

2.

On a question of fundamental importance in the basic rules of proof in administrative proceedings, the District Court's judgment is in conflict with decisions of this Court.

The District Court should have accepted the administrative determination of the Commission that Commercial had not sustained its burden of proof under § 307(a). But the District Court rejected that determination. As a part of the process of rejection and of substitution of its own judgment for that of the Commission, the Court held that the failure of two cement producers to appear at the hearing was proof that should have been accepted by the Commission as establishing that they would use the proposed service. This holding is contrary to *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 91 (1913); *United States* v. *Abilene & Southern Railway Co.*, 265 U.S. 274, 286-288 (1924); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300-302 (1937); *Joint Anti-Facist Refugee Committee* v. *United States*, 341 U.S. 123, 142, 174, 183 (1951); *Gonzales* v. *United States*, 348 U.S. 407, 413-414 (1955); and the many cases therein cited.

In the *Louisville & Nashville* case the court said, 227 U.S. p. 91:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The District Court may perhaps note that two cement producers did not appear, but it cannot take the further step of assuming what their position would be on the question involved. Compare the *Ohio Bell Telephone* case, 301 U.S. pp. 300-302; *Gonzales* v. *United States*, 348 U.S. pp. 413-414.

3.

The District Court erroneously applied Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957), to this case.

In its opinion, Appendix A p. 23, and in its conclusion of law No. 4, Appendix B p. 29, the District Court made the following identical statement:

> "The fact that the shippers opposed the application and would not use the service, in itself, does not nullify or detract from the effect of the directive in the *Schaffer* case that the Commission must assess the advantages of the proposed service in relation to public need."

This conclusion is clearly erroneous. The Commission did not ignore the advantages of motor service; it recited them in its report, Appendix D pp. 33-34. But it held that

since the shippers who controlled the selection of the carrier were entirely satisfied with rail service and would not use the proposed service, there was no issue before it that required weighing the comparative advantages of motor and rail service. The District Court, in finding erroneous this Commission conclusion, in effect holds that evidence of advantages of motor carrier service can somehow be used as a substitute for proof that the service will actually be used by shippers, despite the fact that all of the evidence is to the contrary.

In citing the *Schaffer* case as authority for this holding the District Court has committed error that affects seriously the administration of § 307(a).

In the *Schaffer* case several shippers who controlled the selection of the carrier testified that they would use Schaffer's proposed service because of what they described as advantages it offered over rail service. Here the situation is precisely the reverse since all of the shipper witnesses who control the selection of the carrier testified that they were entirely satisfied with the existing rail service and that they would not use the proposed motor service even if it were authorized.

Obviously, the *Schaffer* decision does not apply here at all. That decision turned on the advantages of motor carrier service to shippers who wanted to employ those advantages, whereas in the instant case the shippers find it to their advantage to ship by rail.

4.

The District Court's judgment is in conflict with § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), and with decisions of this Court relating to burden of proof.

The Administrative Procedure Act, § 7(c), provides that "the proponent of a rule or order shall have the burden of

proof." This was the rule as to proof of public convenience and necessity in motor carrier application cases before that Act was passed. *Alton Railroad Co.* v. *United States, supra,* 315 U.S. 15, 24-25.

The Commission properly held that Commercial had not sustained the burden of proof. Under the cases and statutes above cited Commercial clearly had the burden to prove that the service proposed would be used if authorized. But not a witness was produced who would or could ship cement by applicant's service either now or in the foreseeable future.

Apparently realizing that Commercial was required to prove that its proposed service would be used, the District Court held that that proof had been established by the fact that there were two cement producers in the area who did not appear at the hearing. But that fact has no probative value and could not support Commercial's burden of proof under the authorities cited above.

CONCLUSION

The questions presented are of great importance to the railroad industry, and, we believe, are of equal importance to the entire field of transportation and administrative law. These questions require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ILLINOIS

COMMERCIAL TRANSPORT, INC., Plaintiff, vs. **THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,** Defendants. **CENTRAL TERRITORY RAILWAYS, WABASH RAILWAY COMPANY, ILLINOIS CENTRAL RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, LOUISVILLE & NASHVILLE RAILWAY COMPANY and ALL CLASS I RAIL CARRIERS OPERATING IN THE STATE OF MISSOURI,** Intervening Defendants.	**Civil Action No. 3974**

DECEMBER 22, 1958.

Before Finnegan, Circuit Judge, Platt and Juergens, District Judges.

Plaintiff, an Illinois corporation, with its principal place of business in St. Clair County, Illinois, and in the Eastern District of Illinois, presents its complaint to set aside the report and orders of the Interstate Commerce Commission decided May 10, 1957 and October 3, 1957 denying an application for certificate of public convenience and necessity in Commercial Transport, Inc., Extension Illinois Missouri, Docket No. M.C. 13-104654 (Sub. No. 106). Plaintiff presents

its complaint to this court under 205(g) of the Interstate Commerce Act, 49 U.S.C.A. 305(g), and §10 of the Administrative Act, 5 U.S.C.A. 1009. The court has jurisdiction of the subject matter and the parties. Judicial Code and Judiciary, Title 28 U.S.C.A. §§ 1336, 1398, 2284, 2321-2325.

Plaintiff filed an application on October 26, 1956 seeking a certificate of public convenience and necessity authorizing the operation in interstate commerce, as a common carrier by motor vehicle over irregular routes, of cement, in bulk, in hopper vehicles, between points in Missouri and Illinois. The application was assigned to and heard by a joint board on January 8, 1957. Five railroads who serve this territory and are intervening defendants in this suit, and the Lehigh Portland Cement Company appeared by petition in opposition to the application. The Alpha Portland Cement Company and the Missouri Portland Cement Company provided witnesses who testified against the application on behalf of the railroads. No motor carrier appeared.

On February 1, 1957, the joint board issued a report and an order recommending that applicant be granted authority to transport cement in bulk, in hopper vehicles, between points in Illinois and Missouri over irregular routes. On February 13, 1957 protestant cement company filed exceptions to this report and recommended order, and on March 4, 1957 intervening railroad defendants also filed their exceptions. On March 25, 1957 plaintiff filed a reply to these exceptions. May 24, 1957 the report and order of division 1 of the Interstate Commerce Commission dated May 10, 1957 denied plaintiff's application, thereby rejecting the recommendation of the joint board. July 1, 1957 plaintiff filed a petition for reconsideration with the Commission, and the intervening defendants and the cement producer filed a timely reply. On October 3, 1957 the full Commission upheld the decision of division 1 denying plaintiff's petition for reconsideration "for the reason that the findings of division 1

are in accordance with the evidence and the applicable law." The complaint in this court resulted.

The Interstate Commerce Commission, United States of America, and the intervening defendants who had been granted permission to intervene by this court answered. It is to be noted that all answers were in defense of the decision of the Commission except the answer of the United States of America which "admits only that the Interstate Commerce Commission . . . has failed to make proper findings as to the inherent advantages of plaintiff's proposed mode of transportation," and ". . . prays that the orders of the Commission . . . be annulled and set aside and that the matter be remanded to the Commission to make proper findings in accordance with the National Transportation Policy."

Plaintiff contends:

1. The order complained of is the result of arbitrary and capricious action, and the findings upon which it is based are unsupported by substantial evidence, and

2. In denying plaintiff's application the Interstate Commerce Commission has not correctly applied the standards of the National Transportation Policy, and failed to make adequate findings in terms of that policy.

The transcript of evidence discloses the following facts:

A large highway building program was scheduled by the State of Illinois for 1957 and future years. Large quantities of bulk cement are necessary for such construction. At present railroad service is used to carry bulk cement in the area involved.

Plaintiff is engaged as a common carrier in the business of transporting bulk liquid, principally petroleum products by motor vehicle in interstate commerce over irregular routes between points in Illinois and Missouri and other states pursuant to authority granted by the Interstate Commerce Com-

mission. Plaintiff is now operating 51 tractors and 36 tank trailers, and maintains terminals at various points in Illinois and Missouri. Because it has extra tractors available during the spring, summer and early autumn seasons when demand for bulk cement is heaviest, plaintiff filed this application. The special hoppers necessary to carry bulk cement, and existing terminals in Illinois and Missouri will be available, and service will be on call but not on schedule. Motor carrier service is mechanically feasible and economically practical. Plaintiff is financially responsible and would be a fit carrier to conduct the business. Hefkin Company and the Association of General Contractors of Illinois supported the application.

Hefkin Company is engaged in building highways in Missouri and Illinois, and maintains a ready-mix plant at Belleville, Illinois, which is supplied with cement from Alpha Portland Cement Company and Missouri Portland Cement Company from their St. Louis plants, the Universal Atlas Company of Hannibal, Missouri, and the Marquette Cement Company of Cape Girardeau, Missouri. Hefkin Company had purchased cement on one job from Lehigh Portland Cement Company at Mitchell, Indiana, which also has a plant at Oglesby, Illinois.

Motor transportation of bulk cement has many advantages over transportation by rail. When shipments are made by rail, cement must be ordered prior to the day on which it is scheduled to be used. In the event of rain the number of carloads arriving at the point of destination accumulates. The result is that quantities of cement on hand exceed the space available for storage, thereby necessitating the payment of demurrage. If truck service were available, cement would be ordered when needed and the order cancelled in the event of rain. To utilize rail service a special switch or spur line costing the consignee from $1,500.00 to $4,000.00 must be built at every job site. Except in instances where

sand and gravel are shipped by rail instead of by truck this expense would be eliminated by motor service which is "door-to-door." In every instance the additional truck service from railhead to job site presently needed would be eliminated. On one job Hefkin Company was compelled to truck bulk cement 4½ miles. Due to the volume of cement transported by rail and the sudden advent of winter weather large quantities of cement are usually left over at the completion of a job. Motor carriage permits small amounts of cement to be carried with greater flexibility and would eliminate the loss presently incurred when it is necessary to dispose of this surplus cement locally, since it would become economically feasible to move this surplus to new locations. Hefkin Company would utilize the truck service to supplement rail service.

The railroads at the present time have a sufficient number of hopper cars to transport bulk cement and anticipate loss of business if the certificate for motor truck service were to issue. No investigation was made as to whether Universal Atlas Company or Marquette Cement Company have present facilities for loading trucks, or if not, whether they intend to provide such equipment; the remaining three cement companies who now control the traffic for their bulk cement are not presently equipped for loading trucks, and because of the expense in establishing such facilities, have no immediate intention to build truck loading docks. If this application were granted and cement was trucked by or from a cement company these three cement companies would be forced by competition to make preparation for and use truck service.

Division 1 made the following conclusion which was adopted by the Commission:

> "The paramount issue to be determined in this proceeding is whether public convenience and necessity require the operation proposed by applicant. It is in-

cumbent on the latter to show, among other things, that the proposed service would serve a useful purpose responsive to a public demand or need. The record indicates that applicant has made no effort to determine whether any manufacturer of cement would use its service. Likewise, it appears that the supporting consignee has made no investigation of existing motor carrier service. Applicant does not have the support of a single cement manufacturer who would use its service. In fact, the evidence conclusively shows that the cement producers, who control the routing of the traffic, would not utilize its service. In the circumstances, we conclude that applicant has failed to sustain its burden of proof, and that the application should be denied. In view of this conclusion, there is no necessity to determine applicant's fitness and ability properly to conduct the proposed operation.

"We find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; and that the application should be denied."

The oral argument and large portions of the briefs indicate that the decision of this court turns upon the proposition as to whether or not the denial of the application by the Commission was made in the light of the National Transportation Policy.[1] In *Schaffer* v. *United States*, 355 U.S. 83, 87 the court said:

"The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured."

As set forth in the *Schaffer* case at the foot of page 89 this policy requires that

"When a motor carrier seeks to offer service where

[1]Note 1, prior to Title 49 U.S.C.A. 1, Accumulative Annual Pocket Part, 49 U.S.C.A.

> only rail transportation is presently authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess. How significant these advantages are in a given factual context and what need exists for a service that can supply these advantages are considerations for the Commission."

While it is for the Commission and not this court to determine the weight of the "inherent advantages of the proposed service" it is clearly inconsistent with the announced directives of the National Transportation Policy, for the Commission to conclude that the present or future public need does not require the service without assessing these "inherent advantages." The inquiry of the Commission must be directed not merely to the question, what public need exists for the proposed service, but "what [public] need exists for a service that can supply these advantages . . ." The Commission here as in the *Schaffer* case in arriving at its conclusion as to whether public convenience and necessity required the proposed operation evidently ignored the critical factor, i.e., the advantages of motor carrier service to the public.

The defendants, except the United States of America, contend that the rationale of the *Schaffer* case is not applicable here for the reason that in the *Schaffer* case the shippers and consignees both requested the motor carrier service, whereas in the instant case the shippers opposed the truck carrier's application. It is further contended the finding in the instant case was not "that existing rail service is adequate" but rather "that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation. . . ."

While we should not substitute our judgment for that of the Commission, and though the Commission is not required to state a detailed explanation of its decision, nevertheless it is required that a sufficient reason be given by the Commission for the denial of the certificate to permit this court

to determine the basis for its action. *Chesapeake Motor Lines* v. *United States*, 1957, 153 F. Supp. 812. When the conclusion of the Commission that the applicant did not sustain its burden of proof and the reasons stated for that conclusion are analyzed in view of the National Transportation Policy, it is clear the Commission failed to consider the advantages of the motor carrier service to the public. The fact, that the supporting consignee may have failed to investigate existing motor carrier service is of no significance in the face of the evidence that applicant did inquire and no motor carrier appeared in opposition to the hearing. If there had been a prior certificate for the service in the area the Commission would have taken official notice of it. *Riss & Co.* v. *United States*, W.D. Mo. W.D., 1952, 117 F. Supp. 296. The Commission did not find that it would be useless to issue the certificate for truck service because it would never be used but merely that the cement producers would not presently utilize its service. The service could not and would not be used until it was available. The evidence disclosed that truck service for bulk cement would be practical. Future as well as immediate need of service is an essential element to be considered by the Commission as provided by the Act. *United States* v. *Detroit Navigation Co.*, 1945, 326 U.S. 236. One cement producer opposed the application and agents of two cement producers testified on behalf of the railroads. These three producers had no immediate plan to convert to truck loading on account of the expense involved. The traffic manager of one cement company admitted that his company would install loading facilities for trucks if cement was trucked in the area by any of its competitors, and another stated he opposed the truck service "right now." There were at least five cement producers in the area supplying the consignee and two of these did not appear nor did any of their agents testify at the hearing. The consignees made it clear that it would use the motor service. The railroads anticipated a loss of traffic if

the certificate for truck service issued. The State of Illinois was engaged in a large highway building program which was to continue in 1957 and future years that required large quantities of cement. Yet, insofar as it was explained, the Commission based its conclusion that the applicant did not sustain its burden of proving that the proposed service was responsive to public need, on the basis that the cement producers who controlled the routing of the traffic would not utilize its service. The fact that the shippers opposed the application and would not use the service, in itself, does not nullify or detract from the effect of the directive in the *Schaffer* case that the Commission must assess the advantages of the proposed service in relation to public need.

In the *Schaffer* case the Commission relied upon the fact that rail service was adequate omitting to disclose "whether on balance the public interest would be better served by additional competitive service." *Schaffer* v. *United States*, *supra*, at p. 90. Here the Commission relied upon the shippers' interest without disclosing any reference to the interest of the receivers or consignees, nor to the inherent advantages of the truck service to the public need.

For the foregoing reasons the orders of the Interstate Commerce Commission herein are set aside and remanded to the Commission for further proceedings in accordance with this opinion.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

• • • Civil No. 3974 • • •

Findings of Fact and Conclusions of Law

This proceeding was instituted by a complaint, filed pursuant to 28 U.S.C. 1336, 1398, 2284, and 2321-2325, requesting that orders of the Interstate Commerce Commission (herein called Commission), entered May 10, 1957 and October 3, 1957 in the case entitled *Commercial Transport, Inc., Extension—Illinois—Missouri,* Docket No. MC-104654 (Sub. No. 106) be set aside. In its answer, the Commission denied that it had committed error. The defendant United States, however, responded that the orders in question should be set aside and the matter remanded to the Commission for further findings. All parties, including the intervening railroads, participated. Oral argument was heard on November 14, 1958.

Findings of Fact

1. Plaintiff is engaged as a common carrier in the business of transporting bulk liquids, principally petroleum products, by motor vehicle in interstate commerce over irregular routes between points in Missouri and Illinois and other states pursuant to authority granted by the Commission. Plaintiff filed an application on October 26, 1956, with the Commission seeking a certificate of public convenience and necessity authorizing the operation in interstate commerce by motor vehicle over irregular routes, of cement, in bulk, in hopper vehicles, between points in Illinois and Missouri.

2. At a hearing before Joint Board No. 135, it was es-

tablished that a large highway building program was scheduled by the State of Illinois for 1957 and future years; and that large quantities of bulk cement are necessary for such construction. At present railroad service is used to carry bulk cement in the area involved.

3. Plaintiff's application was supported at the hearing by the Hefkin Company, Inc., a firm engaged in building highways in Missouri and Illinois, and by the Association of General Contractors of Illinois. On the basis of this evidence, the Commission and Joint Board No. 135 correctly found that the motor transportation of bulk cement has the following advantages over its transportation by rail:

(a) When shipped by rail, cement must be ordered prior to the day on which it is scheduled to be used, and in the event of rain, the number of carloads arriving at the point of destination accumulates. The result is that quantities of cement on hand exceed the space available for storage, thereby necessitating the payment of demurrage. If truck service were available, cement would be ordered when needed and the order cancelled in the event of rain.

(b) To utilize rail service a special switch or spur line, costing the consignee from $1,500 to $4,000, must be built at every job site. Except in instances where sand and gravel are shipped by rail instead of by truck, this expense would be eliminated by motor service which is "door-to-door". In every instance, the additional truck service from railhead to job site presently needed would be eliminated.

(c) Due to the volume of cement transported by rail and the sudden advent of winter weather, large quantities of cement are usually left over at the completion of a job. Motor carriage permits small amounts of cement to be carried with greater flexibility and would

eliminate the loss presently incurred when it is necessary to dispose of this surplus cement locally, since it would become economically feasible to move this cement to new locations.

4. Hefkin Company is supplied with cement from Alpha Portland Cement Company and Missouri Portland Cement Company from their St. Louis plants, the Universal Atlas Company of Hannibal, Missouri, the Marquette Cement Company of Cape Girardeau, Missouri, and Lehigh Portland Cement Company at Mitchell, Indiana. Hefkin would use the truck service to supplement rail service.

5. At the hearing, the application was opposed by three cement producers, Lehigh Portland Cement Company, Alpha Portland Cement Company, and the Missouri Portland Cement Company. The Commission correctly found that these producers now control the traffic for their bulk cement and that they are not presently equipped for loading trucks. The Commission further found that "they would not and could not use applicant's service if the authority were granted."

6. The intervening rail carriers similarly opposed the application at the hearing. At the present time they have a sufficient number of hopper cars to transport bulk cement and they anticipate loss of business if the certificate for motor truck service were to issue.

7. In a report and order dated February 1, 1957, Joint Board No. 135 recommended that the application be granted. Following exceptions and a reply thereto, the Commission (division 1) denied the application in a report and order dated May 10, 1957. In reaching this conclusion, the Commission did not consider the inherent advantages of motor service as against rail transportation of bulk cement. It based its decision on the fact that "the cement producers, who control the routing of traffic, would not utilize (the

applicant's) service" and that, therefore, a grant would serve no "useful purpose." The Commission further stated that the supporting consignee had made no investigation of existing motor carrier service.

8. Plaintiff filed a petition for reconsideration of this decision. On October 3, 1957, the full commission denied plaintiff's petition and upheld the decision of division 1 "for the reason that the findings of division 1 are in accordance with the evidence and the applicable law."

9. The Commission erroneously failed to find that the three opposing cement producers do not constitute all the producers in the area involved and cannot speak for the other producers. Thus, there were at least five cement producers in the area supplying the supporting consignee and two of these did not appear nor did any of their agents testify at the hearing.

10. The Commission erroneously failed to find that motor transportation of bulk cement is mechanically feasible and economically practical; that the opposing cement producers stated that they have no *immediate* plans to convert to truck loading on account of the expense involved; and that the traffic manager of one cement company admitted that his company would install loading facilities for trucks if cement was trucked in the area by any of its competitors.

11. In concluding that a grant would serve no useful purpose, the Commission erroneously ignored its prior finding that construction firms would use plaintiff's motor service.

Conclusions of Law

1. The fact that the supporting consignee may have failed to investigate existing motor carrier service, is of no significance in the face of the evidence that applicant did inquire and no motor carrier appeared in opposition at the

hearing. If there had been a prior certificate for the service in the area, the Commission would have taken official notice of it. *Riss & Co.* v. *United States*, W.D., 117 F. Supp. 296.

2. The Supreme Court has stressed that "(w)hen a motor carrier seeks to offer service where only rail transportation is presently authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 89-90. When the Commission's conclusion in the instant case that the applicant did not sustain its burden of proof and the reasons stated for that conclusion are analyzed in view of the National Transportation Policy, it is clear that the Commission failed to consider the critical factor, i.e., the advantages of motor carrier service to the public.

3. The rationale of the *Schaffer* case is not inapplicable to the instant case because here the testifying shippers opposed the truck carrier's application. For, the Commission did not find that it would be useless to issue the certificate for truck service because it would never be used but merely that the cement producers would not presently utilize its service. The service could not and would not be used until it was available. The evidence disclosed that truck service for bulk cement would be practical. Future as well as immediate need of service is an essential element to be considered by the Commission as provided by the Act. *United States* v. *Detroit Navigation Co.*, 1945, 326 U.S. 236. The three opposing cement producers only stated that they had no immediate plans to convert to truck loading on account of the expense involved. The traffic manager of one cement company admitted that his company would install loading facilities for trucks if cement was trucked in the area by any of its competitors and another stated he opposed the truck service "right now." There were at least five cement producers in the area supplying the consignee and two of these did not

appear nor did any of their agents testify at the hearing. The consignee made it clear that it would use the motor service. The railroads anticipated a loss of traffic if the certificate for truck service issued. The State of Illinois was engaged in a large highway building program which was to continue in 1957 and future years that required large quantities of cement.

4. In light of the foregoing, the Commission could not properly base its conclusion (insofar as it was explained) that the applicant did not sustain its burden of proving that the proposed service was responsive to public need, on the ground that the cement producers who controlled the routing of the traffic would not utilize its service. The fact that the shippers opposed the application and would not use the service, in itself, does not nullify or detract from the effect of the directive in the *Schaffer* case that the Commission must assess the advantages of the proposed service in relation to public need. The Commission improperly relied upon the shippers' interest without disclosing any reference to the interest of the receivers or consignees, nor to the inherent advantages of the truck service to the public need.

5. The orders of the Commission under attack in this cause must be set aside, and the case remanded to the Commission for further proceeding.

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United States Circuit Judge,
7th Circuit.

CASPER PLATT,
United States District Judge,
Eastern District of Illinois.

WILLIAM J. JUERGENS,
United States District Judge,
Eastern District of Illinois.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

* * * Civil No. 3974 * * *

FINAL JUDGMENT AND DECREE

The above entitled action having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings and the evidence, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinion and findings of fact and conclusions of law in said action, in accordance with said opinion and findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED, that the relief prayed for in the complaint be, and it is hereby granted, and the case remanded to the Interstate Commerce Commission, to the extent and for the purposes set forth in the opinion and findings of fact and conclusions of law made and signed by the Court.

Dated this 23rd day of January, 1959.

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United States Circuit Judge,
7th Circuit

CASPER PLATT,
United States District Judge,
Eastern District of Illinois

WILLIAM J. JUERGENS,
United States District Judge,
Eastern District of Illinois

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-104654 (Sub-No. 106)

COMMERCIAL TRANSPORT, INC., EXTENSION ILLINOIS - MISSOURI

Date of Service
May 24, 1957

DECIDED MAY 10, 1957

Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle of cement, in bulk, in hopper vehicles, between points in Illinois and Missouri, over irregular routes. Application denied.

Mack Stephenson for applicant.
William J. Tate, Jack J. Gilbert, Joseph L. Quinn, and *Urchie B. Ellis* for protestants.

REPORT OF THE COMMISSION

Division 1, Commissioners Hutchinson, Walrath, and McPherson

BY DIVISION 1:

Exceptions were filed by the opposing rail carriers and by the Lehigh Portland Cement Company to the order recommended by the joint board, and applicant replied. Our conclusions differ from those recommended.

By application filed October 26, 1956, Commercial Transport, Inc., of Belleville, Ill., seeks a certificate of public convenience and necessity authorizing operation, in interstate

or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of cement, in bulk, in hopper vehicles, between points in Illinois and Missouri. The application is opposed by a number of rail carriers operating in the affected territory and by the Lehigh Portland Cement Company and the Missouri Portland Cement Company. A representative of the Alpha Portland Cement Company, whose petition to intervene was denied, appeared as a witness on behalf of the Lehigh Portland Cement Company.

The board recommended that the application be granted. On exceptions, the opposing rail carriers contend that applicant has failed to establish any present or future need for the proposed service; that the existing rail service is reasonably adequate to meet the needs of both shippers and receivers of bulk cement; and that the proposed grant would result in the diversion of important traffic from existing rail carriers throughout the involved two-state area. The Lehigh Portland Cement Company urges that applicant has failed to show that there is any truck loading facility at which it could originate the traffic; and that, as a result, it would be unable to transport the considered commodity, even if it were granted the authority sought. It takes the position that in the absence of a showing of present or future need for the proposed service, applicant should not be granted the authority sought, because such action would permit it to preempt the field by opposing the application of any other carrier who might apply for appropriate authority in the future. In reply, applicant contends (1) that the board's findings are supported by the evidence; (2) that consignees have not received, and cannot receive, a complete and adequate service from rail carriers; (3) that, in view of the growing demand for bulk transportation, it is not manifest that diversion of freight from rail carriers is inevitable; and (4) that denying the application will serve to perpetuate the monopoly enjoyed by rail carriers in the involved territory.

The evidence adduced, the board's recommendation, the exceptions, and the reply thereto have been considered. We find the board's statement of facts to be accurate in most material aspects, and we adopt such statement as our own, subject to certain corrections and additions which are necessary for adequate discussion of the issues raised on exceptions.

As pertinent herein, applicant conducts substantial operations in the transportation of bulk liquids, principally petroleum products, in the territory here involved. It operates approximately 51 tractors and 36 tank trailers and maintains terminals at various points within the considered territory. If the authority sought is granted, it will acquire 3 hopper-type trailers which are especially suited for the transportation of bulk cement. Due to the seasonal use of fuel oil, it has extra tractors available during the spring, summer, and early fall. In these months, during which the demand for bulk cement is greatest, it will utilize such excess power units in the proposed operation.

The application is supported by the Hefkin Company, Inc., of Belleville, a heavy construction firm which has built highways in Missouri and Illinois and operates redi-mix plants at Belleville and Alton, Ill. The cement which it uses is transported by railroads, in bulk, in hopper cars, from Oglesby, Ill., and St. Louis, Hannibal, and Cape Girardeau, Mo. Several difficulties have arisen in connection with rail transportation. First, cement must be ordered prior to the day on which it is scheduled to be used, and in the event of rain the number of carloads arriving at the destination point exceeds the capacity of the storage space available, resulting in the payment of demurrage. Secondly, a special switch or spur line, which usually costs the consignee from $1,500 to $4,000, must be built at every site to enable it to utilize rail service. Because of the volume of cement transported by rail and the method of delivery, large quantities are

usually left over at the completion of a job. It is anticipated that motor carriage, because of the smaller quantity of cement carried and greater flexibility, will eliminate the loss presently incurred when it is necessary to dispose of this surplus cement locally. This concern would use the proposed service to supplement rail service.

The Associated General Contractors of Illinois, an organization representing approximately 116 highway and general construction firms, adduced evidence as to the large highway building program to be undertaken by Illinois in 1957 and future years.

The class I rail carriers operating in Missouri, and Central Territory Railroads oppose the application. They are serving the territory, and have expended substantial sums of capital to provide equipment suitable for transporting the traffic. They assert that their services are adequate to meet the reasonable requirements of both the producers and the consumers of bulk cement. If the application is granted, they feel that they will be deprived of important traffic which they would otherwise receive.

The three cement producing companies opposing the application control and route this traffic from their plants and are entirely satisfied with existing rail service for the movement to their customers. They have no truck-loading facilities, and they would not and could not use applicant's service if the authority sought were granted.

The paramount issue to be determined in this proceeding is whether public convenience and necessity require the operation proposed by applicant. It is incumbent on the latter to show, among other things, that the proposed service would serve a useful purpose responsive to a public demand or need. The record indicates that applicant has made no effort to determine whether any manufacturer of cement would use its service. Likewise, it appears that the support-

ing consignee has made no investigation of existing motor carrier service. Applicant does not have the support of a single cement manufacturer who would use its service. In fact, the evidence conclusively shows that the cement producers, who control the routing of the traffic, would not utilize its service. In the circumstances, we conclude that applicant has failed to sustain its burden of proof, and that the application should be denied. In view of this conclusion, there is no necessity to determine applicant's fitness and ability properly to conduct the proposed operation.

We find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; and that the application should be denied.

An appropriate order will be entered.

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of April, A. D. 1959.

No. MC-104654 (Sub.-No. 106)

COMMERCIAL TRANSPORT, INC., EXTENSION—ILLINOIS—MISSOURI
(Belleville, Ill.)

It appearing, That the United States District Court for the Eastern District of Illinois, in Civil Action No. 3974, *Commercial Transport, Inc. v. United States, et al.*, remanded the above-entitled proceeding to the Commission for further proceedings in light of the Court's opinion, that the Commission on its own motion, by order dated January 23, 1959, reopened the proceeding for further hearing, and that by order dated April 9, 1959, the matter was assigned for further hearing on May 21, 1959, at Springfield, Illinois:

It further appearing, That prior to the entry of the order of April 9, 1959, assigning the further hearing, the protesting railroads herein, intervening defendants in the court action, had taken an appeal to the Supreme Court of the United States and had requested the Commission to issue an order suspending all further proceedings herein pending the outcome of the said appeal;

It is ordered, Upon consideration of the record and good cause appearing therefor, that the order of April 9, 1959, assigning the above-entitled proceeding for further hearing on May 21, 1959, at Springfield, Illinois, be, and it is hereby vacated and set aside, and that all further proceedings in

the matter be, and they are hereby suspended, on our own motion, pending the outcome of the said appeal to the Supreme Court.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)